Supreme Court, U.S.
FILED

992052 JUN 22 2000

OFFICE OF THE CLERK

No. 99-

IN THE
Supreme Court of the United States

LEROY CHARLES GRIFFITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. ROTH, P.A.
Attorney for Petitioner
1450 Madruga Avenue
Suite 302
Coral Gables, Florida 33146
(305) 661-0666

159988

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

184 HTF/05

QUESTION PRESENTED FOR REVIEW

Whether 11 U.S.C. § 523(a)(1)(C) makes a tax debt nondischargeable when the actions of the debtor constitute a willful attempt in any manner to evade or defeat the *payment* of a tax, but do not constitute a willful attempt in any manner to evade or defeat the *assessment* of a tax, where there has been a pre-bankruptcy U.S. Tax Court determination that there was no willful or fraudulent attempt to evade the tax by the bankruptcy debtor and the Internal Revenue Service has stipulated in the bankruptcy dischargeability proceedings, in writing, that the taxes are subject to discharge pursuant to 11 U.S.C. §§ 507(a)(8)(A)(i) and (ii) and § 523(a)(1)(B)(ii).

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Citation of the Official Published Reports of the Opinions and Orders Entered Below	1
Statement of the Basis of Jurisdiction in the Supreme Court	2
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Birkenstock, 87 F.3d 947 (7th Cir. 1996) 2, 9

In re Bruner, 55 F.3d 195 (5th Cir. 1995) 2, 6, 9

In re: Dalton, 77 F.3d 1297 (10th Cir. 1996) 2, 9

In re Fegeley, 118 F. 3d 979 (3rd Cir. 1997) 2, 6, 9

In re: Gaithwright, 102 B.R. 211 (Bankr. D. Ore. 1989) 6

In re Haas, 48 F.3d 1153 (11th Cir. 1995) 2, 6, 7, 8, 9, 10

Joanne Miele, Plaintiff v. United States of America, Defendant, 637 F. Supp. 998, 58 A.F.T.R. 2d 86-6138, 87-2 USTC P 9434 (S.D. Fla., Jun 20, 1986) (No. 85-6365-CIV-EPS) 7

In re: Toti, 24 F.3d 806 (6th Cir. 1994) 2, 6, 9

In re Tudisco, 183 F.3d 133 (2nd Cir. 1999) 2, 9

Cited Authorities

Page

Statutes:

11 U.S.C. § 507(a)(8)(A)(i) ..... i, 3, 4, 5

11 U.S.C. § 507(a)(8)(A)(ii) ..... i, 3, 4, 5

11 U.S.C. § 523(a)(1)(B)(ii) ..... i, 3, 5

11 U.S.C. § 523(a)(1)(C) ..... *passim*

11 U.S.C. § 523(a)(7) 3

11 U.S.C. § 523(a)(14) 3

28 U.S.C. § 157(b)(2)(I) 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1334 4

IRC § 6531(2) 6

IRC § 6653 6

IRC § 6672 6

IRC § 7201 6

Rules:

Bankruptcy Rule 7008(a) 5

United States Supreme Court Rule 10(c) 3

TABLE OF APPENDICES

Page

Appendix A — Published Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated March 24, 2000 ..... 1a

Appendix B — Published Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated May 11, 1999 ..... 17a

Appendix C — Published Order Of The United States District Court For The Southern District Of Florida Affirming Final Judgment Of The Bankruptcy Court Dated March 26, 1997 ..... 30a

Appendix D — Published Findings Of Fact, Conclusions Of Law And Memorandum Opinion Of The United States Bankruptcy Court For The Southern District Of Florida Dated December 9, 1993 ..... 40a

Appendix E — Published Memorandum Findings Of Fact And Opinion Of The United States Tax Court Dated And Filed September 19, 1988 ..... 57a

Appendix F — Published Opinion Of The United States Court Of Appeals For The Eleventh Circuit In *Haas v. Internal Revenue Service*, 48 F.3d 1153 Dated March 30, 1995 ..... 147a

CITATION OF THE OFFICIAL PUBLISHED REPORTS OF THE OPINIONS AND ORDERS ENTERED BELOW

Griffith v. Commissioner, 56 T.C.M. (CCH) 220, 1988 WL 95665 (1988), *modified*, 56 T.C.M. (CCH) 1263, 1989 WL 11176 (1989).

In re Leroy Charles Griffith, Debtor; Leroy Charles Griffith, Debtor/Plaintiff v. United States of America, Defendant, Bankruptcy and Adversary Case Numbers 93-10148-BKC-AJC, 93-0361-BKC-AJC-A. 161 B.R. 727 (Bankr. S.D. Fla. 1993).

In re Leroy Charles Griffith; Debtor. Leroy Charles Griffith, Appellant v. United States of America, Appellee. Number 94-0147-CIV. 210 B.R. 216 (S.D. Fla. 1997)

In re Leroy Charles Griffith, Debtor; Leroy Charles Griffith, Debtor/Plaintiff/Appellant v. United States of America, Defendant/Appellee. Number 97-4845. 174 F.3d 1222 (11th Cir. 1999).

In re Leroy Charles Griffith, Debtor/Plaintiff/Appellant v. United States of America, Defendant/Appellee. Number 97-4845. 182 F. 3d 1297 (11th Cir. 1999)

In re Leroy Charles Griffith, Debtor; Leroy Charles Griffith, Debtor/Plaintiff/Appellant v. United States of America, Defendant/Appellee. Number 97-4845. 206 F.3d 1389 (11th Cir. 2000).

STATEMENT OF THE BASIS OF JURISDICTION IN THE SUPREME COURT

The decision sought to be reviewed through this Petition for Writ of Certiorari was entered by the United States Court of Appeals, Eleventh Circuit, en banc, on March 24, 2000. The Court has jurisdiction to review this decision on a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) and due to it conflicting with another decision of the same Court of Appeals in *In re Haas*, 48 F.3d 1153 (11th Cir. 1995) and, additionally, conflicting with decisions of other circuits:

In re Fegeley, 118 F. 3d 979 (3rd Cir. 1997)

In re Birkenstock, 87 F.3d 947 (7th Cir. 1996)

In re: Dalton, 77 F.3d 1297 (10th Cir. 1996)

In re Tudisco, 183 F.3d 133 (2nd Cir. 1999)

In re Bruner, 55 F.3d 195 (5th Cir. 1995)

In re: Toti, 24 F.3d 806 (6th Cir. 1994)

Accordingly, there is a conflict within the U.S. Court of Appeals for the Eleventh Judicial Circuit as well as a conflict between the U.S. Court of Appeals for the Eleventh Judicial Circuit and the various other circuits listed above, all concerning the exact same issue and interpretation of a specific section of the Bankruptcy Code, to-wit: 11 U.S.C. § 523(a)(1)(C).

The matter requested to be considered by this Honorable Court is of great importance in that the decision of the United

States Court of Appeals would result in that Court effectively acting as a legislative body and eliminating the ability to discharge taxes in a bankruptcy proceeding as provided for by the United States Congress in 11 U.S.C. §§ 507(a)(8)(A)(i) and (ii), 11 U.S.C. § 523(a)(1)(B)(ii) and §§ 523(a)(7) and (14). The interpretation of 11 U.S.C. § 523(a)(1)(C) and the decisions of the United States Court of Appeals for the Eleventh Circuit and the other Circuit Courts dealing with this issue results in the judiciary having changed what the legislature enacted in the Bankruptcy Code and in the virtual non-dischargeability of any taxes contrary to the ability to discharge certain taxes as provided for by the United States Congress in its enactment of the United States Bankruptcy Code.

As stated in Rule 10(c) of the Rules of the Supreme Court of the United States, ". . . a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . ."

STATUTE INVOLVED

The statute involved in this case is 11 U.S.C. § 523(a)(1)(C):

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> (1) for a tax or a customs duty —
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

STATEMENT OF THE CASE

On January 15, 1993, Leroy C. Griffith ("Griffith") filed a voluntary Chapter 7 bankruptcy petition in the Southern District of Florida, which was subsequently voluntarily converted to a Chapter 11.

Griffith then filed an adversary complaint against the Internal Revenue Service ("IRS") seeking a determination that income taxes owed for the years 1969-1970; 1972-1976 and 1978 were dischargeable. These taxes had previously been determined to be due by the U.S. Tax Court, after a contested trial wherein Griffith was the petitioner and the Commissioner of the Internal Revenue was the respondent. *Griffith v. Commissioner*, 56 T.C.M. (CCH) 220, 1988 WL 95665 (1988), *modified*, 56 T.C.M. (CCH) 1263, 1989 WL 11176 (1989).

The Tax Court rejected allegations of fraud made by the respondent against Griffith at pages 81-88 of its decision and also found at page 87 that Griffith did not intend to evade taxes he knew were owing. The Court simply found that Griffith did not posses the requisite intent to commit tax fraud under the circumstances presented but did owe certain taxes, generally due to improper deductions and record keeping.

The basis for jurisdiction in the Bankruptcy Court was that the action was a core proceeding over which the Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I).

Prior to the commencement of the adversary trial, the IRS stipulated with Griffith, in writing, that the taxes in question were dischargeable pursuant to 11 U.S.C.

§§ 507(a)(8)(A)(i) and (ii) and § 523(a)(1)(B)(ii). No affirmative defenses or counterclaims were contained in the pleadings of the IRS, including a lack of pleading 11 U.S.C. § 523(a)(1)(C), which is required to be pleaded affirmatively and with specificity, or as a counterclaim, as it is an avoidance action. Such pleading of this section in that manner is required by Bankruptcy Rule 7008(a).

At the adversary trial, Griffith submitted the stipulation with the I.R.S., rested his case, and moved for judgment in his favor. Over the objections of Griffith, the IRS then moved ore tenus to amend its answer and assert a counterclaim setting forth that Griffith's tax liability should be excepted from discharge under 11 U.S.C. § 523(a)(1)(C) because Griffith allegedly attempted to evade or defeat his tax liability. The IRS conceded there was no attempt by Griffith to evade the *assessment* of the tax, only the *payment*.

The IRS was still not required to plead this amendment with specificity as required by Bankruptcy Rule 7008(a). The IRS basically argued that a previous transfer of assets to exempt tenants by the entireties status under Florida law and out of the reach of the IRS for payment of the taxes owed only by Griffith, and not his wife, barred the discharge of these taxes.

Most importantly, if the conflicting circuit decisions are followed, there was never any finding by the Bankruptcy Court of an ability to pay the taxes by Griffith, this being the third prong of the test used in the various circuit cases disallowing discharge for non-payment (versus evasion of assessment), to wit: where (1) the debtor had a duty to pay taxes; (2) the debtor knew he had that duty; and (3) the debtor voluntarily and intentionally violated the duty when he had

the resources to do so. *In re: Fegeley*, 118 F.3d 979 (3rd Cir. 1997) at page 79; *In re: Bruner*, 55 F.3d 195 (5th Cir. 1995) at page 197. *In re: Toti*, 24 F.3d 806 (6th Cir. 1994) at page 809.

In the decision that the taxes were non-dischargeable, the visiting Bankruptcy Judge rejected cases interpreting 11 U.S.C. § 523(a)(1)(C) to only bar discharge of taxes when there has been a willful attempt to only evade assessment due to the lack of the words "or payment thereof" in 11 U.S.C. § 523(a)(1)(C). *In re: Gaithwright*, 102 B.R. 211 (Bankr. D. Ore. 1989). In other words, those words were written in to 11 U.S.C. § 523(a)(1)(C) to uphold the Court's decision despite the U.S. Congress having made that exact distinction in at least four other provisions contained in the Internal Revenue Code. IRC §§ 6531(2), 6653, 6672 and 7201. *See In re: Haas*, 48 F.3d 1153 (11th Cir. 1995) at page 1156.

Subsequent to the 1993 adversary decision in the Griffith Bankruptcy Court Case, the Eleventh Circuit decided and published *In re: Haas*, 48 F.3d 1153 (11th Cir. 1995), the opinion being written by Judge Birch, who also wrote the en banc decision adverse to Griffith herein.

Not only does the *Haas* decision hold that 11 U.S.C. § 523(a)(1)(C) applies only to evasion of assessment of taxes and not failure to pay same but it even cites to the above referenced Internal Revenue Code provisions for the proposition that if Congress wanted the words "or payment thereof" in 11 U.S.C. § 523(a)(1)(C), then those words would have been included, leaving evasion of assessment, failure to file returns, or filing fraudulent returns as the only grounds to deny tax debt dischargeability pursuant to that section.

Even more interesting is that in *Haas*, Griffith's bankruptcy decision is mentioned with two other cases at pp. 1158-1159, with the Eleventh Circuit rejecting the premise that non-payment of taxes is a bar to discharge under 11 U.S.C. § 523(a)(1)(C) and clearly stating on page 1159 that "Absent explicit language, therefore, the phrase 'attempts in any manner to evade or defeat such tax' does not imply attempts to evade or defeat *payment* thereof ". (Emphasis added by the Court.)

In *Haas*, the debtor used his income to pay personal and business expenses rather than pay the taxes due, as a result of his financial pressures. *Id.* at page 1155. On June 8, 1989, Griffith was married and entered into an antenuptial agreement transferring all his assets to he and his wife, as tenants by the entireties under Florida law, as specifically held proper and allowed by federal case law, interpreting Florida law that such an agreement is sufficient consideration for such a transfer. *Joanne Miele, Plaintiff v. United States of America, Defendant*, 637 F. Supp. 998, 58 A.F.T.R. 2d 86-6138, 87-2 USTC P 9434 (S.D. Fla., Jun 20, 1986) (No. 85-6365-CIV-EPS).

It was not until September 28, 1989 that the IRS made its assessment of the taxes against Griffith.

Griffith appealed the Bankruptcy Court decision to the District Court, relying on the intervening *Haas* decision. *Griffith v. U.S.A.*, 210 B.R. 216 (S.D. Fla. 1997). Despite the *Haas* decision, the District Court affirmed the Bankruptcy Court. This is where the difference without a distinction begins and eventually is enunciated in the Eleventh Circuit en banc decision, to wit: the intentional payment to others and not the IRS in *Haas* after the assessment of the tax is

somehow different than the transfer of assets to tenants by the entirety by Griffith, even though it happened more than three months before any IRS assessment of taxes. The result in *Haas* and *Griffith* is identical-no payment to the IRS.

The point is that if the other Circuit cases and the en banc *Griffith* decision are allowed to stand, taxes can no longer be discharged as provided by the Bankruptcy Code as any payment or transfer of cash to another or transfer of assets to another without paying the IRS is an intentional non-payment of the IRS, even if the money is used for food and shelter.

This result would completely vitiate the tax dischargeability provisions of the Bankruptcy Code. Griffith appealed the District Court decision to the Eleventh Circuit, which reversed, based primarily on *Haas*. 174 F.3d 1222 (11th Cir. 1999). However, the Court suggested en banc reconsideration might be warranted and subsequently vacated its order and set the en banc hearing. *Griffith v. U.S.A.*, 182 F.3d 1297 (11th Cir. 1999).

In its *Griffith* en banc decision, the Eleventh Circuit goes to extreme lengths to distinguish *Haas*, but Judge Birch, again writing the opinion, reaffirms the *Haas* holding that mere non-payment of taxes is insufficient to establish the exception found in § 523(a)(1)(C) and recognizes to decide otherwise would render virtually all tax debts non-dischargeable. *In re: Griffith v. U.S.A.*, 206 F.3d 1389 (11th Cir. 2000) at page 1394-1395 and *In re: Haas*, 48 F.3d 1153 at pages 1158-1160.

However, now Judge Birch says mere non-payment as in Haas (an obviously affirmative act) somehow differs from

other obviously affirmative acts, such as Griffith's legal and proper transfer of assets to tenants by the entireties. Here is the difference without a distinction again. Haas paid everyone except the IRS. Griffith also paid everyone except the IRS. The only difference was the means each used, both being affirmative acts, in the words of Judge Birch.

Lastly, there are other remedies available to the IRS under state and federal law if a transfer is alleged to be improper. This was not the purpose of Congress in enacting 11 U.S.C. § 523(a)(1)(C).

Thus, based on the foregoing, the March 24, 2000 en banc decision of the Eleventh Circuit in *Griffith* conflicts with the Eleventh Circuit *Haas* decision. Furthermore, both decisions conflict with the six other Circuits that hold evasion of assessment and/or evasion of payment of taxes render such taxes non-dischargeable under 11 U.S.C. § 523(a)(1)(C). *In re: Tudisco*, 183 F.3d 133 (2nd Cir. 1999); *In re: Fegeley*, 118 F.3d 979 (3rd Cir. 1997); *In re: Birkenstock*, 87 F.3d 947 (7th Cir. 1996); *In re: Dalton*, 77 F.3d 1297 (10th Cir. 1996); *In re: Bruner*, 55 F.3d 195 (5th Cir. 1995); *In re: Toti*, 24 F.3d 806 (6th Cir 1994).

The narrow reading and strict interpretation of 11 U.S.C. § 523(a)(1)(C) of the *Haas* decision should be upheld and judgment that Griffith's taxes are dischargeable should be directed to be entered on that basis. The broader reading and interpretation urged by the Internal Revenue Service in all these cases results in the defeating of the Congressional intent of allowing discharge of certain taxes in bankruptcy to allow debtors a fresh start.

REASONS FOR GRANTING THE WRIT

As stated above, there is a conflict within the Eleventh Circuit, as well as a conflict with and among six other Circuits as to 11 U.S.C. § 523(a)(1)(C).

The result of these decisions effectively removes what the United States Congress included in the Bankruptcy Code, to-wit; the ability to discharge certain taxes. The Courts should not act as a legislative body under the guise of interpreting a section of law. Additionally, the *Haas* and *Griffith* decisions of the Eleventh Circuit and the decisions of the other Circuits cited herein leave the Bankruptcy and District Courts without a clear direction on 11 U.S.C. § 523(a)(1)(C).

Congress included the language "or payment thereof" in at least four Internal Revenue Code sections, demonstrating it knew when it wanted it included and when it did not. It did not want it included in 11 U.S.C. § 523(a)(1)(C) and it is not found there. Accordingly, Congress only intended evasion of assessment of taxes to be non-dischargeable under that section , while the non-payment of taxes, willful or not and in whatever manner not done, as it is virtually always willful, should be dischargeable under 11 U.S.C. § 523(a)(1)(C).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT L. ROTH, P.A.
Attorney for Petitioner
1450 Madruga Avenue
Suite 302
Coral Gables, Florida 33146
(305) 661-0666